

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

DOCKET No.

78-1239

MARSHALL P. SAFIR,

Petitioner,

vs.

ROBERT W. BLACKWELL, Individually and as
Assistant Secretary of Commerce, AMERICAN EXPORT LINES,
LYKES BROS. S.S. CO. INC., AMERICAN PRESIDENT LINES,
FARRELL LINES INC., PRUDENTIAL LINES INC., P.S.S.
STEAMSHIP CO. INC., UNITED STATES LINES INC.,
MOORE McCORMACK LINES INC.,

Respondents.

Petition for Writ of Certiorari to the
U.S. Court of Appeals for the Second Circuit

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ROBERT W. BLACKWELL, Individually and as Assistant
Secretary of Commerce, AMERICAN EXPORT LINES,
LYKES BROS. S.S. CO. INC., AMERICAN PRESIDENT
LINES, FARRELL LINES INC., PRUDENTIAL LINES
INC., P.S.S. STEAMSHIP CO., INC., UNITED STATES
LINES INC., MOORE McCORMACK LINES INC.,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit

Petitioner prays that a Writ of Certiorari issued to
review the judgment of the United States Court of Appeals
for the Second Circuit entered in the above entitled case
on June 27, 1978, (appendix page 15a) and affirmed on
November 28, 1978 denying rehearing *en banc* (App.
p. 7a).

SAFIR V.

OPINIONS BELOW

SAFIR I.

Safir v. Gibson, 417 F.2d 972 (2nd Cir. 1969).

SAFIR II.

Safir v. Gibson, 432 F.2d 137, 145 (2nd Cir. 1970), cert. denied, 400 U.S. 850, cert. denied sub nom. *American Export Lines et al. v. Gibson*, 400 U.S. 942 (1970).

SAFIR III.

Safir v. Blackwell, 469 F.2d 1061 (2nd Cir. 1972).

SAFIR IV.

Safir v. Kreps, 551 F.2d 447 (D.C. Cir. 1977), cert. denied, U.S.L.W. 3215 (1977).

Safir v. Blackwell, Kreps, American Export Lines et al., — F. Supp. — (Dooling 1977) (App. p. 25a).

Maritime Subsidy Board decision in Docket S243

Investigation into Alleged Sec. 810 Violation

14SRR 77 (1973) Pike and Fisher

13SRR 809 (1973) Pike and Fisher

12SRR 1105 (1972) Pike and Fisher

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES

a. Authority for promulgation of *Rules* 28 U.S. Code Annotated Sec. 2072.

Rules of Civil Procedure, by Act of June 19, 1934 (ch. 651 48 Stat. 1064 effective on September 16, 1938 (308 U.S. 645; Cong. Record 83, pt. 1, p. 13, Exec. Comm. 905)).

Specifically *Rule* 15(c) as amended in 1966

(c) **RELATION BACK OF AMENDMENTS.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

b. Merchant Marine Act 1936, 46 U.S.C. 1227 (see appendix p. 164a).

c. False Claims Act, 31 U.S.C. 232(A)(B)(C) (see appendix p. 165a).

QUESTIONS PRESENTED

Whether an erroneous interpretation of *Rule 15(c)* of the Federal Rule of Civil Procedure should be allowed to prevent the double damage recovery for the United States under the False Claims Act 31 U.S.C. 231, 232, 235 of funds falsely claimed and illegally paid to government subsidy contractors who were in violation of §810 of the Merchant Marine Act 1936 46 U.S.C. 1227.

Whether complicity of the highest government officials in a fraud against the United States would be *relevant* to tolling the 6 year statute of limitations bar to the court's jurisdiction under 31 U.S.C. 235.

STATEMENT OF THE CASE

This single continuing litigation has been at issue for more than a decade. It stems from one period in 1965-1966¹ and concerns the illegal conduct of government subsidy contractors in the American Merchant Marine during that period.

In the ensuing years, petitioner has prosecuted this claim against these ocean carriers to prove that violations of law did in fact occur. In April 1973 the Maritime Subsidy Board of the Department of Commerce held that the violation of Section 810 of the Merchant Marine Act, 46 U.S.C. 1227, was proven. See *Pike and Fisher*, 13 S.R.R. 809, 14 S.R.R. 77 (App. 93a). This finding was affirmed by the Secretary of Commerce in September 1974 (see appendix p. 89a).

This case has been before this Court on three occasions by this petitioner² and once by the offending carriers Pet. 388-1970, Pet. 229-1973, Pet. 76-1505 and *American Export v. Gibson*, 400 U.S. 942. Certiorari was denied in each instance. In the Pet. 388-1970 (400 U.S. 850) Mr. Justice Douglas was of the opinion that certiorari should have been granted at that time.

On or about June 24, 1968, the first action was initiated in the United States District Court for the Eastern District of N.Y. In essence, the action sought a declaratory judgment and to require the responsible officers of the United States Government to discontinue subsidy payments to the following carriers:

1. See FMC Docket 65-13 Investigation of Rates on Government Cargoes (11 FMC 263, 1967).

2. 400 U.S. 850, 400 U.S. 942 also Pet. 229 (1973) Pet. 76-1506.

American Export Isbrandtsen Lines, Inc.
 American President Lines, Ltd.
 Bloomfield Steamship Co.
 Farrell Lines Incorporated.
 Prudential Grace Lines, Inc.
 Lykes Bros. Steamship Co., Inc.
 Moore-McCormack Lines, Inc.
 Prudential Steamship Co., Inc.
 United States Lines, Inc.

and to recover subsidy payments already made on the ground that such carriers had violated Section 810 of the Merchant Marine Act (46 U.S.C. Sec. 1227) by engaging in practices in concert which were unjustly discriminatory or unfair to Sapphire Steamship Lines, Inc.

At the time Petitioner filed the 1968 action, the United States Government did not have in its possession, all of the evidence and information necessary to establish that such carriers had violated Section 810 of the Merchant Marine Act. Most significantly, Sapphire Steamship Lines status as a common carrier on established trade routes from and to the United States which would uniquely qualify for invocation of the statute.

On various dates in 1971, in connection with hearings before the Maritime Subsidy Board, Petitioner made available to the government through Michael J. McMorro, Esq., of the Federal Maritime Administration, all the information in his files and the files of Sapphire SS Lines; and, as the moving party in the investigation, participated throughout the hearings which took two and one-half years.

During those hearings, Mr. McMorro stated "... in the present case, and notwithstanding the inclusion of the requirements of Section 810 of the act in each and every

subsidy agreement, the respondents did not request contractual permission but proceeded to effect rate reductions and to wage battle before the F.M.C. *Once the board was involved, and only through the behest of Mr. Safir*, the respondents firmly deny to this date that rate actions are subject to the section. The distinctions are all too apparent. What remains is a clear provision of the subsidy contract and an explicit statute both binding on the respondents as of *the day they first began, without any overture to the Maritime Administration, the unlawful behavior.*" (Emphasis added). Deceit therefore was recognized.

As a result of Petitioner's oral and documentary evidence and later participation in argument before the Board, the criteria for the finding of a violation as contoured in *Safir v. Gibson*, 1970, *supra*, was met. On April 16th, 1973, the offending carriers were found to have violated the act by the M.S.B. and this finding was affirmed by the Secretary of Commerce in September 1974. See appendix pp. 89-95a also 13 S.S.R. 809 and 14 S.S.R. 77, *Pike and Fisher*.

The hearings (\$243) before the Maritime Administration, therefore, were an outgrowth of the proceedings which Petitioner initiated in 1968. Petitioner had made known orally and in writing on numerous occasions to the government and to the offending carriers that, if the administrative investigation upheld his contention before the courts in the Second Circuit, Petitioner had the right, on behalf of the United States, to enforce its full legal rights under its subsidy contracts with these carriers and had the right to remuneration in the nature of a *qui tam* allowance for services on behalf of the government. Amendments adding additional claims for damages had uniformly been held to relate back and not to introduce new causes of action (*Vann v. United States*, 420 F.2d 968 (Ct. Cl. 1970); *J. L. Simmons Company, Inc. v. United States*, 412 F.2d

1369 (Ct. Cl. 1969); *Tabacalera Cubana v. Faber Coe & Gregg, Inc.*, 379 F. Supp. 772 (S.D.N.Y. 1974); and most significantly *United States v. Templeton*, 199 F. Supp. 179 (E.D. Tenn. 1961)).

Indeed, it is only because the government in collusion with the contractors avoided the normal course of instituting a legal action for breach of the subsidy contracts by adopting the anomalous procedure of holding administrative hearings to decide whether to sue and then settling before suit was instituted that they circumvented the fact that the carriers filed false vouchers for subsidies.³ With the 6 year statute of limitations running the government officials delayed decision for 6 years and 3 months.

As alleged in the proposed amended complaint, each of the defendant carriers had entered into subsidy contracts with the government prior to its violation of the Merchant Marine Act in which it expressly agreed (in *haec verba* with Section 810 of the Merchant Marine Act) that it would not

"engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory of unfair to any other citizen of the United States who operates a common carrier by water, exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports."

Each had expressly agreed that no payment or subsidy of any kind would be made if it violated the above quoted provision. Each voucher which it submitted for a subsidy payment was accompanied by the affidavit of an officer

3. See 32nd Report by the House of Representatives Committee on Government Operations together with additional views 95th Congress 2nd Session House Report No. 95-1680 "Problems in the Relationship Between the Maritime Administration and a Private Trade Organization."

swearing that he was familiar with the terms of the agreement, that the carrier had fully complied with them and was entitled to the payment requested. The subsidy payments to particular carriers during relevant periods were a part of the record before the Maritime Subsidy Board.* Thus, the conduct and transactions which were in issue before the Maritime Subsidy Board as a result of the 1968 complaint and are now *res judicata* are the same as which form the basis for the proposed amended complaint. The amendment conforms the pleadings to the proof and makes appropriate changes in the complaint to reflect the chronology of events and additional claims for damage under the False Claims Act (31 U.S.C. Sec. 231 *et seq.*).

Each of the Safir decisions I through V contain a short history of the case to the date of each decision. In order to preserve time and expense petitioner will set forth the posture of the case since the decision in Safir IV in the Court of Appeals for the District of Columbia Circuit.

On April 26, 1977 this petitioner filed a petition in this Court No. 76-1505 requesting review of an otherwise favorable decision by the District of Columbia Circuit Court of Appeals in Safir IV. The reason for the writ was the need for a precise determination of the limits of the discretion of the Sec. of Commerce *not* to seek recovery of all subsidies paid by the Department of Commerce prior to remand of the District Court for the District of Columbia.

The petition also advanced the collateral estoppel effect of the False Claims Act on the finding of violations of 46 U.S.C. 1227 by the Maritime Subsidy Board and Secretary of Commerce. This Court left undisturbed the procedure established for the remand and did not address the false claims issue at that time. Certiorari was denied.

* See certified report, Maritime Administration, App. p. 162a-163a.

On May 27, 1977, petitioner filed an action in the Eastern District of New York (Docket 77c, 1093) within six years of the final payments by the United States of residual amounts due on subsidy vouchers relating to the eleven month period in 1965-1966. This recovery claim pertained to operating differential subsidies only which were subject to audit and final settlement in 1971. (See Injunction Pendente Lite, 1971, app. 103a). Construction differential subsidies paid during the period of violation had no known residual balances and consequently an amended complaint was filed to cover recovery of this form of subsidy as well as the afore mentioned operating differential subsidies in Docket 68c, 643 with a motion to consolidate both actions.

The new action Docket 77-1093 was dismissed and leave to file the amended complaint was denied on December 20, 1977. (See Memorandum, Order and Annex A appendix p. 25a-65a).

Judge John F. Dooling, Jr. annexed relevant portions of a deposition given by this petitioner to his decision which alleged that ex-President Richard Nixon had entered into a conspiracy with the defendant subsidy contractors through one of the steamship operators, Spyros Skouras, Sr. to defeat this petitioner in his subsidy recovery litigation and minimize the settlement of an existing antitrust suit filed by the bankrupt Sapphire Steamship Lines. The sum of seven million dollars was to be paid to Mr. Nixon for this "deal." This alleged agreement took place prior to his election to the presidency and included the acquiescence of Richard Nixon in the selection of Mr. Skouras' Greek-American compatriot, Spiro Agnew as Nixon's vice presidential running mate (appendix pages 47a-65a).

The proceeding in Docket 77c, 1093 in the Eastern District of New York involves an Order of Dismissal on

jurisdictional grounds and accordingly the uncontroverted pleadings and the allegations excerpted from the Deposition of Marshall Safir and annexed to the Order by Judge John F. Dooling, Jr. must be accepted as true. *Carr v. Learner*, 547 F.2d 135, 137 (1976). *Walker v. Food Machinery Corp.*, 382 U.S. 172, 174-175 (1976) and *United States v. New Wrinkle Incorporated*, 342 U.S. 371, 376 (1976). Cf. 5 Wright & Miller, *Federal Practice and Procedure*, Section 1350, pp. 551-553 (1969).

At a status call on January 1978, procedures concerning the remand of the action *Safir v. Kreps*, Docket 74-1474 as a result of the decision in SAFIR IV in the D.C. Circuit were implemented and a motion was filed soon thereafter by this petitioner for a subpoena to the General Services Administrator for certain relevant "Nixon tapes" and other documents. (See affidavit and motion, app. p. 150a-161a).

On March 29, 1978, Judge William Bryant denied the motion. This petitioner then appealed to the D.C. Circuit and on July 28, 1978 the appeal was dismissed as interlocutory but with a *per curiam* order that this dismissal would not preclude the filing of a renewed motion "if future events so required".

On June 27, 1978, the Second Circuit decision in SAFIR V was filed affirming the District Court. On July 11, 1978, this petitioner filed a petition for rehearing en banc.

On October 13, 1978, petitioner filed a Supplemental Memorandum (app. p. 7a) to the en banc request enclosing the House of Representatives Thirty-second Report by the Committee on Government Operations. No. 95-1680, Ninety-fifth Congress. This report concerned the problems existing in a conflict of interest between the Maritime Administration of the Department of Commerce and the National Maritime Council, a private trade organization. Respondent Robert W. Blackwell and H. Clayton

Cook a member of the M.S.B. when S243 was held were sharply criticized. See pp. 1-16 also views of Rep. McCloskey p. 34. This memorandum included a letter sent to Judge Bryant requesting that judicial notice be taken (app. p. 11a).

On December 20, 1978, petitioner deemed the House Report *supra* of sufficient relevance as to constitute a "future event" within the meaning of the July 27, 1978 *per curiam* decision of the D.C. Circuit and renewed his motion for a subpoena *duces tecum* to the General Services Administrator for the Nixon tapes citing Judge Bryant's own guidelines issued November 7, 1978 in *Dellums v. Powell*, 561 F.2d 242 (1977), *cert. denied* July 3, 1978, rehearing denied October 4, 1978. With this, petitioner demanded an "Overton" type hearing (*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1970)) based on the bad faith of the government officials charged with the investigation in S243 by the Second Circuit mandate. No action has been taken on the renewed motion to date.

REASONS FOR GRANTING THE WRIT

It was clear from the original complaint in Docket 68c, 643 (appendix p. 143a) that the remedy sought was first, a declaratory judgment under 28 U.S.C. 2201 *et seq.* that this conduct was illegal; and second, that the recovery of monies illegally paid out during the period of violation be implemented for the United States. As can be seen from the complaint, all the carriers were named in the original action albeit not yet as defendants. They all had notice of plaintiff's intent even prior to his filing suit by notice to them and to the Maritime Administration, demanding the cessation of subsidy payments, and that steps be taken to recover from these carriers. The carriers participated in all phases of the legal action to protect themselves from any prejudice. Their activities during the preliminary period 1968 through 1970 are the subject of the charges made against these carriers in open Court before Judge Dooling in this case (see appendix p. 69a through 74a). The Safir Deposition from which Judge Dooling's Annex A was excerpted establishes the period as the summer of 1968 before Nixon's election to the office of presidency that the alleged conspiracy was hatched.

In 1972 this plaintiff brought to the attention of the court his intent to amend the original action as soon as the violation of §810 was finally determined by the administrative process. This occurred even within six years of the violative period. At no time has there been any attempt to change the period of duration of the violation in question, the nature of the subsidies subject to recovery, the parties from whom the recovery would be sought, the beneficiary of the money refunded, nor the conduct which made the payments illegal in the first place.

Point I

The amended complaint adding a false claims "count," arose out of the matter of the original complaint.

As stated in 3 Moore Federal Practice (1978 2d edition) at page 15-198, "the Federal Rules have broadened the meaning of concept of 'cause of action' shifting the emphasis from a theory of law as to cause of action to the specified conduct of the defendants upon which plaintiff relies to force his claim.¹ And an amendment which changes only the legal theory of an action² or adds another claim arising out of the same transaction or occurrence will relate back.³ Thus an amendment will relate back which changes the theory of recovery⁴ . . . or increases the amount of damages claimed."⁵

In SAFIR V, Judge Friendly stated that he could find no sound basis for disagreeing with the analysis of Judge Dooling in denying leave to amend the 1968 Complaint with False Claims Act Amendment. A reading of 3 Moore Federal Practice 1978 edition would produce the conclusion that there is *no sound basis* under Rule 15(c) as amended in 1966 to agree with Judge Dooling. Petitioner respectfully submits that the analysis of Judge Dooling and the Circuit Court affirmation are clearly erroneous.

1. *Smith v. Piper Aircraft Corp.*, (M.D., Pa. 1955) 18 FRD 449 *Green v. Walsh*, 21 FRD 15 (E.D. Wis. 1957).

2. *Land o' Lakes Incorporated v. Buckingham Freight Lines*, (D. Minn. 1972) 351 F. Supp. 102 *aff'd* (CA 8th 1974) 501 F.2d 938. And also *Travelers' v. Brown*, 338 F.2d 229, 234, 235 (5th Cir. 1954). Also *Bradford v. New York Times* (S.D.N.Y. 1969) 13 FR Serv. 2d 15A.3.

3. *Tiller v. Atlantic Coast Line RR*, (1945) 323 U.S. 574 (an action brought under the Federal Employers' Liability Act; amendment alleged violation of Boiler Inspection Act).

4. *U.S. v. Templeton*, 199 F. Supp. 179 (E.D. Tenn. 1961), an amendment under the False Claims Act to add new claims for double damages as additional relief to an amended complaint brought under the Commodity Credit Corporation Act was allowed.

5. *Ibid.* at 179.

The false claims count for additional damages arises out of the matter of the original complaint. When a violation of §810 is found all vouchers submitted for subsidies during the offending period are false. A ham and egg relationship is unavoidable. The original complaint contended that the payments were illegal and in applying for both operating and construction differential subsidies under 46 U.S.C. 1171, the carrier responding falsely represented to the government that they were not parties to any agreement in violation of §810 of the Merchant Marine Act, thereby making them ineligible to receive said subsidies.

The false claims amendment for additional damages is not "new matter", or a "new demand", or a "new claim", or a "new count." The case of *U.S. v. Templeton*, 199 F. Supp. 179, 183 addresses the issue raised by Judge Dooling in this regard. It was stated therein by Judge Wilson "the rule to be followed in Federal Courts is if there is an identity between the amendment and the original complaint with regard to the general wrong suffered and with regard to the general conduct causing such wrong, then the amendment shall relate back and the statute of limitations would not avail to preclude a hearing on the merits." Applying this rule to the case at hand, the issue is not who the original defendant was (in this case the Secretary of Commerce) but what he was being asked to do to correct the wrong suffered. The wrong suffered in this case was, in the words of Judge Friendly, "that public monies had been used to assist some citizens to hurt the others in a manner inimicable to the interests of the United States". SAFIR I, 417 F.2d 972, 979 footnote 8. Further in applying this rule the primary issue here is not the identity of the persons

named as defendants at the outset but the general conduct that caused the wrong. In this case the election of the carriers as members of AGAFBO

"to continue as a party to or to conform to any agreement with any other carrier or carriers by water or to engage in any practice in concert with another carrier or carriers by water which is unjustly discriminatory or unfair to any other citizen of the United States, etc. . ."

There is no transformation of the original complaint by adding that the illegal payments of subsidy were false, fictitious or fraudulent and subject to double damages. The payments were illegal because the competitive conduct of the recipients was illegal and because Sapphire Steamship Lines met the criteria set forth in the law to define the injured carrier. (See SAFIR I, *supra* p. 977 footnote 6.)

"the district court thought that withdrawal of subsidies was unrelated to the competitive interest of the injured line since other innocent lines could at once be admitted to the roots and subsidized. Apart from the question of whether any such lines are waiting in the wings, Congress felt that subsidy payments to violators affect the competitive position of the victim and we see no reason why we should or could reject that conclusion."

The vouchers submitted for these payments were false because the carriers held out that they had complied with the provisions of §810 when they had not. So that the violation of §810 and the false billing that was its consequence, both arose out of the same conduct, transaction or occurrence.

"in essence the amendment seeks only applification of the damages claimed to have arisen out of the conduct complained of in the original pleading. The general

rule in this regard is that an amendment increasing the amount of damages claimed or merely varying the prayer for relief does not state a new cause of action and may be allowed after the statute of limitations has run. Thirty-four American jurisprudence limitations of actions, §265." *U.S. v. Templeton*, *supra* at 184.

Also see *Foman v. Davis*, 371 U.S. 178, *Vann v. U.S.*, 420 F.2d 968 (CT. CL 1970), *Applied Data Processing Incorporated v. Burroughs Corporation*, 11 FR Srv. 2d 1097 DCD (Conn. 1977).

The opinion of Judge Wilson in *U.S. v. Templeton*, *supra* is the antithesis of Judge Dooling's holding in regard to relating back. Both the period during which the wrong took place is the same and the deceitful conduct of misrepresentation was integral to the illegal acts themselves. The amounts of subsidy recovery and the method of compilation are unchanged except for the doubling of damages.

Point II

The "conduct transaction or occurrence" test was fully met to allow the amendment under *Rule 15(c)*⁶ and there was adequate notice to all parties.

The Courts below are in error in their citing of *U.S. v. Templeton*, *supra* on the issue of notice because they cite the diversity of the wrong suffered in the first count of the Templeton complaint instead of the identity of the wrong suffered and the conduct causing such wrong in the second count. It is the second count which parallels the circumstances in the instant appeal, not the first. The

6. See *Longbottom v. Swaby*, 397 F.2d 45, 48 5th Cir. 1968 and *Cf. U.S. v. Johnson*, 288 F.2d 40, 5th Cir. 1961 and *Copeland Motors Co. v. General Motors Corporation*, 199 F.2d 1952.

adequacy of notice on the second count was evidenced in the fact that the 22 bails of cotton which was the subject of the original complaint were the same 22 bails which were the subject of the second count of the amended complaint. In the instant appeal, appellant's demand is for the same relief as in the original complaint, the recovery of all subsidies both construction and operating differential subsidies paid to the named violators in the original complaint save for the doubling of damages.

Templeton is specific and a definitive authority on relating back as it pertains particularly to the False Claims Act. Support for it can also be found in *Williams v. United States*, 405 F.2d 234, 236, 238 (5th Cir. 1968). This was an action wherein the Fifth Circuit reversed a denial of leave to amend under Rule 15(c) in an action under the Federal Tort Claims Act. The Court held that as long as the amended complaint refers to the same transaction or occurrence and defendant was put on notice, there will be no bar to amendment and even new defendants and new theories of recovery will be allowed.

As to the issue of notice the defendant carriers received not only notice of the suit to recover subsidies paid during the offending period, but they were informed of a jeopardy even more severe than the doubling of damages which was incorporated in the original complaint and that was the demand for cessation of payment of all subsidies in the future. Since 1969, these violators of §810 have received in excess of four billion dollars—far greater than the amount at issue at double damages here. When these carriers intervened as defendants they did so in time to defend themselves against all issues and, indeed, was subject by the Second Circuit to an Order under Rule 19 of the Federal Rules of Civil Procedure if they had not joined in the action as defendants. In this regard, it should be

noted that the Court in *SAFIR I*, *supra*, at footnote 4, stated as follows "while the parties have not discussed in this court whether the AGAFBO lines were required to be joined as defendants we are concerned that this position of the action in their absence may "... as a practical matter impair or impede" their ability to protect their interest in the subject matter of this litigation. F.R.C.P. Rule 19. Accordingly, if the District Court should require their joinder or if they should intervene, we would not wish the District Court to feel that anything said in this opinion precludes its considering any new arguments which the AGAFBO lines may bring to its attention."

Later in the *per curiam* opinion of the Court on June 18, 1970, *SAFIR II* at 145, the issue of notice to these defendants was further put to rest by the following statement:

"moreover while we relied mainly on this point at 143, we did not at all mean to suggest that the AGAFBO lines should not have been aware of the possible effect of the FMC determination in the proceeding under §810 of the MMA of whose potentiality they were apprised very shortly after the FMC decision."

And so as stated *Williams v. United States*, *supra*, "determining whether the adversary had fair notice, the usual emphasis on 'conduct transaction or occurrence' is on the operational facts which give rise to a claim by a particular party based on any one or all of the theories conjured up, whether timely or belatedly." In this case, as in *Williams*, *supra*, the conduct or occurrence (the violation of §810) was based on a constant and unchanging operational set of facts and was stated fully and was subsequently proved. Any attempt to equate the present claim for double damages under the False Claims Act on

an identical set of operational facts which existed then as now, with the diversity situation *Rosenberg v. Martin*, 478 F.2d 520 (2nd Cir. 1973), cited in the courts below is an absurd reading of comparative general fact situations.

In *Rosenberg*, plaintiff gave no notice that a claim for the violation of his rights to a fair trial would be amended with a new and different claim of physical assault years later. The only resemblance between petitioner's case and assault in *Rosenberg* is the element of surprise through underestimation of the persistence of the plaintiff of whose purpose defendants were fully on notice from the inception of the litigation. The inference that double damages to the carriers and loss of control of the prosecution by government officials represents the new assault is one which has an analogy in *Tiller v. Atlantic Coastline Railroad*, *supra*, at page 580 and 581. In granting leave to amend, the Court stated:

"the original complaint in this case alleged a failure to provide a proper lookout for deceased giving improper warning of the approach of a train, to keep the head car properly lighted, to warn the deceased of an unprecedented change in the manner of shifting cars. The amended complaint charged the failure to have locomotive properly lighted. Both of them related to the same general conduct, transaction and occurrence which involved the death of the deceased. There was, therefore, no departure. The cause of action now as it was in the beginning the same. It is a suit to recover damages for the alleged wrongful death of the deceased. . . . There is no reason to apply a statute of limitations when as here the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in the respondent's yard."

"Respondent's yard" in the SAFIR case was the port of Washington, D.C. Petitioner submits that there can be

no reconciliation between "Tiller" on *Rule 15(c)* and the decision of the District Court as affirmed by the Circuit Court.

Point III

The threshold relief sought was for a declaratory judgment in addition to an order compelling agency action.

Contrary to the stated reasons of the lower Courts in denying leave to amend the original complaint, the threshold relief sought in the complaint and the *sine qua non* of any further relief thereafter was for a declaratory judgment that the *conduct* found to be violative of the Shipping Act of 1916 (46 U.S. 814, 817) by the Federal Maritime Commission (11 FMC 263 *et seq.*), in this singular case was violative of the Merchant Marine Act of 1936 as well. There would have been no foundation for declaring payments of subsidy funds to the contractors illegal without such a seminal determination by the District Court. In invoking the jurisdiction of the District Court, counsel for the petitioner in 1968 cited 28 U.S.C. 2201, 2202 (declaratory judgment)—see original complaint appendix page 143a, and the relief demanded was a consequence of this illegal conduct if the court found such illegality of subsidy payments. In 1969, the District Court dismissed the action without addressing this issue at all. See *Safir v. Gulick, et al.*, 294 F. Supp. 630 (1969). This relief was delayed for two years until the decision in *Safir v. Gibson*, 432 F.2d 137-145 (SAFIR II) confirmed that this conduct would be violative of the law if the specific fact situation at the time of the violation was as stated in the complaint and the unsubsidized American ship line victim qualified under the criteria of the statute.

When the District Court holds and the Second Circuit confirms the original action was one to compel agency action that description by itself is incomplete. The Courts compression of plaintiff's claims into a narrow contrast between the FMC decision in Docket 65-13, *supra*, and the failure of the Maritime Subsidy Board to take appropriate action in light of 46 U.S.C. 1227 overlooks the paramount importance of the declaratory judgment that only the Court could supply.

While the action "sought to compel public officers to do what plaintiff contended it was their duty to do, *to this day* the District Court and indeed the Second Circuit have abstained from granting declaratory judgment on the issue of violation, and they have refused to order the government to "commence appropriate legal action to recover the subsidy payments heretofore illegally made which was the demand in the original complaint.

The decision of the Second Circuit in SAFIR V discusses the frustrating background of the case from the point of view of the petitioner and would gently criticize the law officers and government officials who in Judge Friendly's words "controlled the prosecution." In this petitioner's first petition to this Court in 1970, where cert. was denied (although Justice Douglas was of the opinion that certiorari should have been granted at that time, *Safir v. Gibson*, 400 U.S. 850,) the reply brief of petitioner's counsel and a copy of Judge Dooling's proposed order are expository of the tortuous method by which the declaratory judgment was avoided and where this order was transformed into a decade of delay and where this petitioner would now stand accused of having burdened the law officers of the government with the full expense of the "prosecution." Appendix p. 140a-142a. The Department of Commerce held an investigation in S243—the prosecution never took place.

Point IV

The District Court was in error in holding that there was no basis for dismissing the original Federal defendants and substituting the intervening defendants as active wrongdoers under the False Claims Act once the violation of §810 of the Merchant Marine Act 1936 was *res judicata*.

Under the 1966 Amendment to *Rule* 15(c) there is every sound basis for authorizing an amendment to a complaint after the statute of limitations has run that would dismiss the Secretary of Commerce as defendant and cast the carrier defendants as the sole defendants. As has been shown the issue of notice to the carriers was never in question. They were fully aware of the original complaint and received notice of the action even before it was filed. It is stated in 3 Moore, *supra*, page 15-212 "where the plaintiff seeks to change the capacity in which the action is brought or in which the defendant is sued there is no change in the parties before the court, all parties are on notice of the facts out of which the claim arose, and relation back has been allowed in both the case of the plaintiff and the defendant" (*Montgomery Ward v. Callahan*, (C.C.A. 10th—1942) 127 F.2d 32). See *F. Frankel v. Styer*, E.D. Pa. 1962, 209 F. Supp. 509 (from Guardian *ad litem* to administrator of the estate) and *Smith v. Guarantee Service Corporation* (N.D. Cal. 1970), 51 F.R.D. 289. In *Smith v. Guarantee*, *supra*, it was held that a plaintiff in an action based on violations of the security acts was permitted to amend his complaint to assert an affirmative cause of action against the defendant as an active wrongdoer, the defendant having been named in the original complaint only as a stakeholder. The amendment petitioner here pleads is not distinguishable—a change in the status in the intervening defendants who were willful vio-

lators of the Merchant Marine Act to that of sole defendants and active wrongdoers of a related statutory violation, accepting payment for false claims on the subsidy vouchers submitted for the period that the violation took place.

The change of plaintiff from Marshall Safir to United States *ex rel.* Marshall Safir is routine. The history of the False Claims Act from *U.S. v. Griswold* (D. Oregon 1885), 24 Fed. 361, 366 *affirmed* C.C. Oregon 1887, 30 Fed. 762 to the present is replete with such substitution and is inherent in the act itself. The United States is the real party in interest. As stated in *Rule 17(a)* of the Federal Rules of Civil Procedure ". . . a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought and when a statute so provides an action for the use or benefit of another shall be brought in the name of the United States." In this case the wisdom of *Rule 17* prevails to protect the United States from the "corrupt arrangement to frustrate plaintiff's endeavor to vindicate his claims" which took place at the highest level of government.

It is stated in 3 Moore, *supra*, 15-233 "the 1966 amendments to *Rule 17(a)* describing a lenient procedure for substituting as plaintiff the real party and interest after defendants objections, will dispose of many problems which might have arisen under *Rule 15(c)* and further illustrates the federal rules general policy in favor of liberal treatment of amendments substituting parties." In this regard the attorney general under the False Claims Act §232(c) could still exercise his rights under this section by indicating his willingness to appear and prosecute. Even if he did not this petitioner with licensed counsel would act for the United States instead of those government officials who controlled what might best be described as the avoidance of prosecution.

A case that is a good illustration of this situation is *U.S. ex rel. Construction Specialties Company v. Travelers' Insurance Company* (D. Colo. 1966), 40 F.R.D. 316, *affirmed sub nom. Travelers' Indemnity v. the United States* (CA 10th Cir. 1967, 382 F.2d 103, 106).

Here the Court of Appeals held that an amendment changing defendants was permitted to relate back because the court found the original defendants had been shielding related corporations who were the proper parties.

As stated in 3 Moore, *supra*, at page 15-22:

"Insurance company," the original defendant, actively participated in the action at the pleading stage. "Indemnity company," the proper defendant, was a wholly-owned subsidiary of insurance company, sharing the same directors, managers and home office address. Allowing the indemnity company to be joined after the statute of limitations, the Court citing and quoting "Treatise," said "when the named defendant created a facade indicating that it was the party in interest when it then knew that it had not written this bond, it served as an indication that the real party had notice and was being protected. This tends to show a relationship between the parties which motivated the protective action. Indeed, if Travelers' Insurance were not interested in insulating Travelers' Indemnity, it would have been satisfied to merely be relieved from defending—it would not now be opposing plaintiff's motion to substitute."

In the Safir case, the Department of Justice acting for the Secretary of Commerce and the Maritime Subsidy Board by an attorney in its admiralty and shipping section opposed petitioner's motion to substitute and filed an affidavit in opposition. The Secretary of Commerce in controlling the action under the guise of prosecution for a period of more than six years to protect his steamship

constituents* until the statute of limitations could be called into question acted in a manner analogous to Travelers' Insurance. The facade must be pierced in this case. The only party representing the United States in good faith during the six year period was this petitioner.

Point IV

The complicity of government officials in a "Corrupt Arrangement" to conceal a fraud and not to prosecute is relevant as it tolls the statute of limitations under the False Claims Act.

The corrupt scheme hatched in 1968 between Richard Nixon and Spyros Skouras acting for himself and others becomes relevant at this point.

The original complaint sets forth the claim that the plaintiff was injured by the illegal payments in 1965 and 1966 to the carriers who conspired to violate 46 U.S.C. 1227. Plaintiff did not then know that he was being victimized by a *new* conspiracy to frustrate his efforts to vindicate his claims and he remained in ignorance of this new conspiracy until late in 1973 while helpless to expedite a decision which could confirm the violation during the seasonable six-year period for an amendment to his complaint. He was not aware that the violation of 31 U.S.C. 231 was being concealed by a delay in the process of decision making under 46 U.S.C. 1227 which was fraudulently inspired by the ex-President himself.

Five years of fraudulent concealment of the conspiracy entered into with the nominee of the Republican Party prior to his election in the summer of 1968 until knowledge of the concealment was in the hands of this petitioner in October 1973, would have tolled the statute until October 1979 and eliminated what the second Circuit claimed were

"serious difficulties with respect to the Statute of Limitations" (See SAFIR V and its footnote 3).

How could the Courts below have held that the corrupt scheme was not relevant to the False Claims Acts claim under these circumstances? This Court has stated in its decision in *Holmberg v. Armbrecht et al.*, 327 U.S. 392 (1945) at page 396

"... fraudulent conduct on the part of defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity based on a mere lapse of time."

Justice Frankfurter goes on to state that "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part the bar of the statute does not begin to run until the fraud is discovered, although there being no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey v. Glover*, 21 WALL 342, 348 and see *Exploration Company v. United States*, 247 U.S. 435; *Sherwood v. Sutton*, 5 Mason 143."

In this case the fraudulent concealment by the conspirators, both government and contractors, was facilitated by the Second Circuit's unwillingness to address the issue of the False Claims Act and the plaintiff's rights thereunder in 1972 while he was still in ignorance of the conspiracy. Judge Dooling in his order of December 20, 1977 points out that he himself was willing to address the issue in 1972. But the panel above had refused to clarify these rights after being implored by plaintiff to do so. (See Appendix pages 34a-37a).

The reluctance of the Court of Appeals to examine the False Claims Act aspects of the case acted as a caveat

against the pursuit of a *qui tam* action until the violation of Section 810 was finally established in the administrative investigation. Due diligence at an earlier time would have had a counter-productive effect against arriving at such determination as the conspiracy was already at work to expand the loophole in SAFIR II, *supra* through endless delay.

The footnote loophole in SAFIR II is restated here as follows:

"Nothing we have said could be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers participation in the illegal action, should it find these matters relevant to its ultimate decision of whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom."

Earlier action to press the False Claims Amendment in the corrupt atmosphere which prevailed could have also resulted in a finding that no violation of Section 810 ever occurred. The arrogance bred from the concept of administrative non-statutory mitigation combined with control of the six year time frame gave the conspirators the confidence to permit a truthful finding of fact by the Maritime Subsidy Board and an affirmation of the violation by Secretary Dent as long as it would be delayed until six years and three months after the original complaint was filed.

The recent decision in *Charles Pettis ex rel. United States v. Morrison Knudsen et al.*, 577 F.2d 668 (9th Cir. 1978) which will be further explored in the companion petition in *U.S. ex rel. Marshall Safir v. American Export Lines Inc. et al.*, is illustrative of this situation:

Judge Sneed in "Pettis" at page 673 states:

"Of course, a different situation exists when the corruption out of which the false claim arose also serves to

prevent government action as where, for example, a corrupt public official who is party to the fraud prevents government action by concealment or otherwise."

The "corrupt scheme" had by this time blossomed into a "incestuous" conflict of interest when the National Maritime Council was formed, and is a testimonial to the way that corruption can seep down and penetrate the second echelon when the highest officials are either "enfeebled or corrupt." (See *Charles Pettis ex rel. United States v. Morrison Knudsen Company, supra*, 673. Cf. House Government Operations Report, *supra*.)

The Federal Respondent in this petition Robert J. Blackwell, Assistant Secretary of Commerce for Maritime Affairs is severely criticized. Some of these officials* who controlled the avoidance of prosecution are cited in the House Report, *supra* for "blatant" and "outrageous" conflict of interest in their relationships with the government subsidized contractors during the period from 1971 to 1977 and the Report calls for their investigation by the Department of Justice under Title 18 of the U.S. Code.

The payments made in 1971 to the carriers—some of which were withheld by the injunction *pendente lite* ordered by Judge Dooling (see *Safir v. Gibson* memorandum appendix page 103a) were residual balances of the earlier increments paid in 1965, 1966, 1967 and as such were being paid three years after the Nixon-Skouras conspiracy began. As stated in *United States v. Klein*, 23 F. Supp. 426, 441, 442 and affirmed in the 3rd Circuit:

"... it is the last date when the government paid any money on a particular claim by which anchorage may be had with the jurisdiction required to maintain a false claims action."

* The Federal respondent in this petition, Robert Blackwell (who, with his general counsel H. Clayton Cook "controlled the prosecution" members of the Maritime Subsidy Board in S243 in 1973) is still in office under the present administration and was prominent in the proceedings in *U.S. ex rel. Greenberg v. Burmah Oil*, 558 F.2d 43 (2nd Cir. 1977).

Therefore it can be seen that fraudulent concealment of the violation of Section 810 and refusal to prosecute for recovery under the False Claims Act during the period after the conspiracy began and while the final payments were being made pertaining to the violative period, made the Safir disclosure of the corrupt arrangement with ex-president Nixon *not only relevant but crucial* to relief under the "Holmberg" exception in the event that his plea for leave to amend under *Rule 15(c)* was rejected on other grounds as was the case here in the Courts below.

In regard to the refusal to prosecute by corrupt officers *U.S. v. Rippetoe*, 178 F.2d 735, 736, 737 (1949) is authoritative. The court held that knowledge in possession of one who has participated in the fraud is knowledge that would be in the hands of one whose interest would be to conceal it and refuse to prosecute it. Facts material to the right of action in this circumstance are not in the hands of those who may be expected to protect the government.

Petitioners deposition and oral affidavit in court which in effect amended his pleadings were uncontroverted by the defendants contractors. These pleadings because they were uncontroverted in the dismissal for lack of jurisdiction have to be accepted by the appellate court as true. *Carr v. Learner*, 547 F.2d 135 (2nd Cir. 1976). 5 Wright and Miller, *Federal Practice and Procedure, Civil Section 1350*, pages 551-553 (1969). *U.S. v. New Wrinkle*, 342 U.S. 371, 376 and *Walker v. Food Machinery Food Corporation*, 382 U.S. 172, 174-175.

When the Court of Appeals upheld the finding of irrelevancy of this conspiracy (by a footnote in SAFIR V) the conclusion is virtually compelled that the Second Circuit had simply refused to grant an Article III forum even when fraud by the subsidy contractors was compounded

by the involvement of corrupt government officials. When this occurs a decision such as *U.S. v. Borin*, 209 F.2d 145 (5th Cir. 1954) which held that fraud and concealment by the subsidy contractor *alone* does not toll the statute sec. 235 falls far short of the issue addressed by Judge Parker in *Rippetoe* and Judge Sneed in *Pettis*. The complaint against Borin by the Attorney General bore great resemblance to petitioner's action in the nature of the deceit and the fact that the subsidies sought to be recaptured were originally paid out "in reliance upon the truth and honesty of defendants certifications and in accordance with . . . regulations providing for tentative payment upon preliminary approval, the subsidy agency paid the defendants claims upon preliminary approval only and prior to receipt of any evidence of non-compliance with [OPA] regulations." *U.S. v. Borin, supra*, at page 146. In the Safir case most of the final payments as stated were paid in 1971—three years after the 1968 conspiracy to cover up the 1965, 1966 deceit.

There is no basis to immunize the fraud when the bribery of the government official involved is an ex-President of the United States.

The peremptory determination of Safir V that the charges of conspiracy involving the recovery of \$227,000,000 in illegal payments (app. 163a) from the contract violators and a \$7,000,000 fund placed at the disposal of the ex-President of the United States (app. 153a-161a) were not germane to the False Claims Act "count" reduces "relevancy" to a linguistic absurdity to accomplish the denial of the Article III forum for this petitioner. It would quarantine him from the availability of the unasailed exception in *U.S. v. Rippetoe, supra*, which most recently found accord in *Pettis ex rel. U.S. v. Morrison-Knudsen, supra*, that *if it prevents prosecution, government involvement in the fraud tolls the statute* in 31 U.S.C. 235 by the same token as prior knowledge on the part of these officials under 31 U.S.C. 232(c) would not bar the jurisdiction of the court from action later filed.

The Second Circuit in its opinion of SAFIR V evidenced some concern that a citizen-advocate of this petitioner's aggrievement, persistence and perspicacity should be without a remedy to profit for himself after twelve years of litigation because of the restrictive nature of 31 U.S.C. 232C. The Circuit Court implies a willingness to have this Court reconsider the meaning of the phrase "when-ever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States at the time such suit was brought." The Second Circuit evidenced sympathy for the petitioner here when it stated "Safir is at the opposite pole from the mere busy body who copies a government's indictment as his own complaint and who brings to light no frauds not already disclosed and no injury to the Treasury not already in the process of vindication . . ." In so stating it was distinguishing *U.S. ex rel. Safir v. American Export et al.*, (1977) from its own decision in *U.S. ex rel. Greenberg v. Burmah Oil Company*, 558 F.2d 43-45, *cert. denied*, 46 U.S.L.W. 3357 (1977).

But in short the Second Circuit would foreclose the Safir actions notwithstanding petitioner's basic right under Rule 15(c) which has been so well and so often interpreted and the obvious difference between a relator most of whose information was derived from the New York Times and this relator who was, himself, a victim of false claims and who was the recognized moving force behind he effort at recoupment for the United States.

The court below also evidenced malaise over the use of literalism as in *U.S. ex rel. Aloff v. Aster*, 275 F.2d 281, 183 (3rd Cir. 1960), *cert. denied*, 364 U.S. 1960 which extended the restrictive clause "considerably beyond the evil sought to be remedied and gives it a broader effect than would be indicated by the legislative history reviewed by Judge Hastie, 176 F. Supp. 208, 209-210, affirmed in

Aster." But all of these positive expressions are nought when the Second Circuit refuses to certify this petitioner's case to the Supreme Court as being the one which would be so offensive to the intent of Congress as to call for review.

The concern for the victim of predation was the lynch pin of the decision in SAFIR I and this has been repudiated by that Circuit in SAFIR V. The Second Circuit evidenced deep concern over the Congressional intent regarding the position of a victim of predation by subsidized contractors. Since that decision, each decision has drained vitality from this concern until the slippage culminating in the decision in SAFIR V has nullified both the Congressional intent and the very integrity of SAFIR I, itself.

The following quotations are from SAFIR I and the petitioner submits that the false claims amendment lurked behind every line: (1) The primary concern manifested was the added burden that subsidies imposed on the competitive position of the victim. We think this concern also extends to the interests of a former victim in the recovery of subsidies improperly paid in the past. (2) Recovery of such payment imposes an added cost on the violators and thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him. (3) We find that §810 is defined to promote the competitive interest of the victim . . . plaintiff Safir stated in an affidavit that he desired to return to the shipping business as soon as possible. (4) The grant to private citizens of a remedy that would not exist in the absence of specific authorization in no way precludes the availability and further relief consistent with the statutory scheme. Even if the victim is successful in a trouble damage suit against the violators, his recovery does not correct the evil at which §810 was aimed, namely that public monies have been used to assist some citizens to hurt others in a manner inimicable to the interests of the United States."

The Court of Appeals for the District of Columbia in *Safir v. Kreps*, 551 F.2d 447, SAFIR IV knew that an amended complaint would be filed when they affirmed his standing to sue stating "of particular importance here is the decision in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) in which the Court added the requirement that "the plaintiff who seeks to invoke judicial power stand to *profit* in some personal interest (if he wins the suit)."

Chief Judge Wright in interpreting SAFIR I reiterates the competitive interest of a victim particularly this petitioner and states that it is enough if Congress thought a victim would profit through recovery of illegally paid subsidies and consequently failure of the government to extend the intended benefit to the victim is injury of fact.

Judge Wright held that no authority had been pointed to which would permit the Secretary of Commerce to adjudicate what Judge Friendly had described as a contract dispute. Appellant respectfully submits that the corrupt scheme is both germane to the False Claims Act Amendment for additional damages and is essential to an understanding of the underlying reasons for a government agency to eschew the normal course of instituting a legal action demanded in the original complaint. When the Second Circuit permitted the adoption of the anomalous procedure of holding hearings to decide whether to sue and then settling before the suit was instituted the agency was able to conceal the fact that the carriers filed false vouchers for subsidies.

The Second Circuit in citing its own decision in *U.S. ex rel. Greenberg v. Burmah Oil*, 558 F.2d 43, as a bar to jurisdiction under 232(c) would overlook its own liberality not to require the existence of government corruption

in the fraud which is the cornerstone of the *Rippetoe* and *Pettis* exception. The Court in *Greenberg* "only where the process of organization produced new information such as the disclosure of the existence or nature of a fraud could it arguably provide a sufficient predicate for jurisdiction." *Greenberg*, at p. 46.

Further, the only approach which could maintain any remaining defense for the contractors divorcing falsity alone, from specific intent to defraud was to avoid confrontation with its own dictum in *Greenberg* to declare the entire "corrupt arrangement" not germane—willy nilly—which it did.

Judge Friendly would reveal in SAFIR V that the Second Circuit sought an argument which would sustain the petitioner in that "no one in government had entertained any thought of pursuing the steamship companies under 31 USC 231." Petitioner respectfully submits that this statement is disingenuous in two respects:

1. The Court in rejecting petitioners motion for leave to amend the original complaint has already likened such initiative as an "assault" on both the government defendants and the subsidy contractors (see *Rosenberg v. Martin*, *supra*. SAFIR V App. p. 21a).

2. The discussion in SAFIR I & SAFIR II with their evidence of "concern for the victim" see *Safir v. Gibson*, 417 F.2d 972, 977, 978 carefully pointed to "common law principles" in recovery of subsidies by the United States under a negative theory that there was no statutory prohibition.

Praise for the initiative of this pro se petitioner in single handedly unearthing an innovative legal theory under the False Claims Act which as amended has been on the books since 1943 and to which a liberal interpre-

tation had been applied by the Supreme Court only a few months before SAFIR I (1969) when this Court decided the case of *U.S. v. Neifert/White*, 390 U.S. 228 (1968) evinces too much generosity for the petitioner and too little for the learned judge's ability to absorb all current legal thought.

The fraud must remain inchoate no longer. Indeed there was every sound basis for disagreeing with Judge Doolings decision. When the Second Circuit finds that putting the agency to the expense of an investigation is an estoppel of the right of the United States and Marshall Safir to recovery under the False Claims Act under *Rule 15C* directly relating back to the original conduct charged to be illegal by the named offenders in the original complaint, it convulates SAFIR I in its Brandeisian concept to act instead as a *bar* to the philosophy of reentry and also the recovery of false claims for the United States (contrast *Foman v. Davis*, 371 U.S. 178 and *U.S. v. Neifert/White*, *supra*.)

The concept of the False Claims Act may be anathema to some whose faith is secure in the diligence of our law officers or to those who would be the discretionary arbiters of the public weariness with scandal in our most revered institutions. Contrary to the opinion below this *is* the case that is so offensive to the intentions of Congress as to pray for this Court's consideration of the questions presented and to invoke the Court's power of supervision.

Respectfully,

/s/ Marshall P. Safir
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